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15 Attorneys for Plaintiff
16 United States of America

17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 SAN FRANCISCO DIVISION

21
22 UNITED STATES OF AMERICA, } CR 08-0160 SI
23 Plaintiff, } UNITED STATES' MOTION AND
24 v. } [Proposed] ORDER
25 JOHN JOSEPH COTA, } TO ALLOW DISCOVERY OF THE M/V
Defendant. } COSCO BUSAN'S NOVEMBER 7, 2007,
27 } BRIDGE RECORDING
28 _____ }

1 The United States, by this motion, seeks an order from the Court authorizing the
2 parties to discover the vehicle recorder recording in this case.

3 **I. Factual Background**

4 Captain John Cota is charged with, among other things, negligently discharging oil
5 into the San Francisco Bay in violation of 33 U.S.C. §§ 1319(c)(1)(A), 1321(b)(3). The
6 charges stem from an incident on November 7, 2007, when Captain Cota was piloting the
7 *M/V Cosco Busan*, a container ship. The ship allided into one of the towers of the Bay
8 Bridge, and spilled oil into the Bay.

9 A key issue in the case is whether Captain Cota piloted the ship in a negligent
10 manner. While Captain Cota piloted the ship, his and the crew's dialogue was captured
11 on a voice data recorder (VDR). The National Transportation Safety Board (NTSB) has
12 released a transcript of the recording, but not the actual recording. (A copy of the
13 transcript is attached as Exhibit A.) The transcript contains relevant information such as
14 Captain Cota issuing commands, crew members commenting on visibility, and a
15 discussion regarding the symbols on an electronic chart. Without the actual recording, it
16 is difficult to fully understand and verify the accuracy and completeness of the transcript.
17 The crew members who are recorded on the recording are being held as material
18 witnesses in this case. *See In Re Material Witness Warrants*. CR 07 90552 MISC VRW
19 (JCS). Here the recording would compliment the transcript by providing information on
20 the speakers' identities and the accuracy of the transcript. In short, the recording is the
21 best evidence of what transpired on the bridge of the *M/V Cosco Busan* before it allided
22 with the Bay Bridge.

23 **II. The Law**

24 Under 49 U.S.C. § 1114(d), the NTSB may "not disclose publicly any part of a
25 surface vehicle voice or video recorder . . ." the NTSB is allowed, as they did in this case,
26 to release the transcript of the recording.

27 The Court may authorize limited disclosure of the recording to ensure a fair trial.
28 Pursuant to 49 U.S.C. § 1154(a) (3)"[A] court may allow discovery by a party of a cockpit

1 or surface vehicle recorder recording if, after an in camera review of the recording, the
2 court decided that – (A) the part of the transcript made available to the public . . . do not
3 provide the party with sufficient information for the party to receive a fair trial; and (B)
4 discovery of the cockpit or surface vehicle recorder recording is necessary to provide the
5 party with sufficient information for the party to receive a fair trial.”

6 When a court authorizes disclosure of the recordings, the court should issue a
7 protective order. Specifically “[w]hen a court allows discovery in a judicial proceeding
8 of a part of a cockpit or surface vehicle recorder transcript not made available to the
9 public under section 1114(c) or 1114(d) of this title or a cockpit or surface vehicle
10 recorder recording, the court shall issue a protective order— (I) to limit the use of the part
11 of the transcript or the recording to the judicial proceeding; and (ii) to prohibit
12 dissemination of the part of the transcript or the recording to any person that does not
13 need access to the part of the transcript or the recording for the proceeding.” 49 U.S.C. §
14 1154(a) (4).

15 III. Argument

16 Here the recording is the best evidence of what transpired on the bridge of the *M/V*
17 *Cosco Busan* before it allided with the Bay Bridge. The release of the recording is crucial
18 to verify the accuracy of the transcript, to identify the speakers in the transcript, and to
19 better understand the context of the statements in the transcript. Furthermore, the VDR
20 recording includes a period of time that is longer in duration than the limited portion
21 transcribed by the NTSB. Finally, in addition to the need to provide the defendant with a
22 copy of the VDR for discovery purposes, it is also necessary for the parties to be able to
23 share the tape with the material witness crew members and their counsel. Accordingly
24 the Court, subject to a protective order, should authorize disclosure of the recording to the
25 defendant and to the material witnesses in this case and their counsel.

26 Defense counsel has informed the United States that he believes that a protective
27 order is neither required nor necessary.

28 As required by the statute, a copy of the *M/V Cosco Busan's* November 7, 2007,

1 bridge recording will be submitted under separate cover for the Court's in camera review.

2 Respectfully submitted,

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9 DATED: May 7, 2008

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

The Court has reviewed in camera the following:

- a copy of the *M/V Cosco Busan*'s November 7, 2007, bridge recording,
 - the transcript of the recording made available to the public,
 - the United States' Motion To Allow Discovery of The *M/V Cosco Busan*'s November 7, 2007, Bridge Recording, and
 - the indictment in this case.

The Court finds that the part of the transcript made available to the public does not

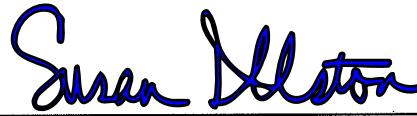
1 provide the parties in this case with sufficient information for the parties to receive a fair
2 trial, and discovery of the bridge recording is necessary to provide the parties with
3 sufficient information for the party to receive a fair trial.

4 Accordingly pursuant to Federal Rule of Criminal Procedure Rule 16 and 49 U.S.C. §
5 1154(a) (4) the Court authorizes disclosure of the bridge recording pursuant to
6 following protective order:

- 7 (A) the use of the recording is limited to this judicial proceeding; and
8 (B) the dissemination of the recording to any person that does not need access to the
9 recording for the proceeding is prohibited.

10
11 SO ORDERED.

12 Dated: _____


HONORABLE SUSAN ILLSTON
United States District Court Judge

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